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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 258

DEAN MILK COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF MADISON, WISCONSIN, A MUNICIPAL CORPORATION, DR. C. K. KINCAID, AS HEALTH COMMISSIONER FOR THE CITY OF MADISON, WISCONSIN, LEONARD HOWELL, AS CITY MANAGER OF THE CITY OF MADISON, WISCONSIN, AND THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
Appellees

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

J. ARTHUR MORAN,
GEORGE S. GEFFS,
JACOB GEFFS,
ELI BLOCK,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Nature of the case the statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	12
Dates of judgments and appeals	13
Manner in which Federal question was raised	13
The Federal questions involved are substantial	16
Appendix "A"—Opinion of the Circuit Court of Dane County	33
Appendix "B"—Opinion of the Supreme Court of the State of Wisconsin	47
Appendix "C"—Preface of General Order 125 by the Wisconsin Department of Agriculture	53

Table of Cases Cited

Brimmer v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862	24
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 50 S. Ct. 451	30
City of Wenoka v. *Rose Lawn Dairy* (Okla.), 212 P. (2d) 1056	26
Dean Milk Co. v. *City of Madison, Wis.*, —Wis. —, 43 N. W. (2d) 480 (June 30, 1950)	13
Dean Milk Co. v. *City of Waukegan* (1949 Ill.), 87 N. E. (2d) 751	26
Dyer v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. (2d) 733	11, 16, 20
Dyer v. *City Council of the City of Beloit*, 68 S. Ct. 87	18
Dyer v. *City Council of Beloit*, 252 Wis. 249	19
Dyer v. *City Council of the City of Beloit*, 333 U. S. 825, 68 S. Ct. 450	18
Fiske v. *State of Kansas*, 274 U. S. 380, 47 S. Ct. 655	30
Freeman v. *Hewit* (U. S.), 67 Sup. Ct. 274, 276	24
Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283	26
Higgins v. *City of Galesburg* (Ill.), 81 N. W. (2d) 520	26

Page

H. P. Hood & Sons v. *DeMond*, 326 U. S. 525, 69 S. Ct. 657 22
Home Ins. Co. of New York v. *Morse*, 22 Wallace 445, 22 S. Ct. 365 31
John P. King Mfg. Co. v. *City Council of Augusta*, 227 U. S. 100, 48 Sup. Ct. 489, 72 L. Ed. 801 13
LaFranchi v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 P. (2d) 1301 25
Meridian v. *Sippy*, 54 Cal. App. (2d) 214, 128 P. (2d) 884 25
Miller v. *Williams*, 12 Fed. Supp. 236 26
Moultrie Milk Shed Inc. v. *Cairo* (Ga. 1950), 57 S. E. (2d) 199 27
Opinions of the Attorney General of Michigan, *Biennial Report of the Attorney General*, 47-48, No. 0-5105, Nov. 6th, 1946 26
Prescott v. *City of Borger* (Tex.), 158 S. W. (2d) 578 26
Sheffield Farms Co., Inc. v. *Seaman*, 114 N. J. L. 455 177A, 372 25
State ex rel. Larson v. *City of Minneapolis*, 190 Minn. 138, 251 N. W. 121 25
State of Minnesota v. *Barber*, 136 U. S. 313, 34 L. Ed. 455 24
Urban v. *Taylor* (N. J.), 188 Atl. 232 26

STATUTES CITED

Constitution of the United States:
Section 8 of Article I 6, 12, 14
Fourteenth Amendment 7, 12, 14
Act of June 25, 1948 (c) 646; 62 Stats. 929, 28 U. S. C. A., Sec. 1257(2) 1, 31
Ordinances of the City of Madison:
Sec. 7.11 4, 5, 7, 8, 12, 13, 21
Sec. 7.21 4, 8, 13
Wisconsin Statutes:
Sec. 269.56 3, 28
Sec. 328.021 21

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STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under the Act of June 25th, 1948, C. 646, 62 Stat. 929 of the Judicial Code, 28 U. S. C. A. Sec. 1257 (2), from a final judgment of the Supreme Court of Wisconsin entered the 30th day of June, 1950. The

above cited Judicial Code provides that a final judgment rendered in the highest court of a state in which a decision could be had, may be reversed by the Supreme Court as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

The facts from which the case arises may be briefly stated as follows:

On March 8th, 1948, plaintiff, which is engaged in the distribution of Grade A pasteurized milk and milk products in Chicago and other communities of Illinois and Southern Wisconsin, including Dane County, Wisconsin, applied to the City of Madison for a license to sell its Grade A pasteurized milk and milk products within the city. (R. 53). On March 12th, 1948, its application was denied, because the plaintiff's pasteurization plant was located in Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as Capitol Square, and at a distance of about seventy-five miles from Madison. (R. 53). At that time, the City of Ordinance of Madison provided that:

> "It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner hereinafter provided within a radius of five miles from the central portion of the City of Madison, otherwise known as the Capitol Square, at a plant the machinery, equipment and facilities of which

shall have been approved by the Health Department." (R. 52).

There was no limitation in the Madison Ordinance on March 8th, 1948, as to the location of farms producing the milk.

On November 20th, 1948, plaintiff commenced its action for declaratory relief under Sec. 269.56 of the Wisconsin Statutes, alleging in its complaint the five mile limitation above set forth; that it was engaged in the pasteurization and sale of Grade A milk and milk products; that it had applied for a license to sell pasteurized Grade A milk and milk products on March 8th, 1948; that its application was denied because of the five mile limitation in the City Milk Ordinance; that the production, pasteurization and transportation of its milk met all the requirements of the Madison Ordinance except it was not pasteurized within five miles of Madison; that the five mile limitation was in violation of the Interstate Commerce Clause and the Fourteenth Amendment to the United States Constitution; that it had repeatedly urged the city to repeal the five-mile limitation, but that Madison had refused to do so; that a controversy existed between the plaintiff and the defendants; that it was necessary for the protection of its rights to secure a declaratory judgment under Sec. 269.56 of the Wisconsin Statutes, and prayed that the five-mile limitation be declared unconstitutional and for a full and complete determination of its claims and demands set forth in the complaint.

Defendants answered admitting that there was a controversy as to the constitutionality of the five-mile limitation, and alleging that the plaintiff obtained its milk from two hundred or more farms located chiefly in Illinois, and that it was impractical, and would place too heavy a burden upon the Madison Health Department to inspect farms from

which the plaintiff obtained its source of milk. (R. 199-236, 203, 206).

While that suit was pending, the City of Madison adopted a new milk ordinance on August 27th, 1949. This new Ordinance contained the five-mile limitation in Sec. 7.21 which reads:

> "It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health." (R. 270).

The new Ordinance of August 27th, 1949 added a new limitation of twenty-five miles upon the location of farms producing milk for the City of Madison. Sec. 7.11 reads as follows:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obli-

> gated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capitol Square. * * *" (R. 245-246).

The appellant-plaintiff filed an amended complaint alleging that a controversy existed as to this twenty-five mile limitation and prayed to have it declared in violation of the Interstate Commerce Clause and the Fourteenth Amendment to the Constitution of the United States.

The defendants secured an order to show cause why all reference to Sec. 7.11 of the new Madison City Ordinance (the twenty-five mile limitation) should not be stricken from the appellant's (plaintiff's) amended complaint.

The trial court denied this order to show cause, and ordered the plaintiff to file a second amended complaint separating its allegations as to the respective sections of the milk ordinance involved, and alleging the unconstitutionality of the five-mile limitation in one count, and the unconstitutionality of the twenty-five mile limitation in the second count.

The plaintiff did this and filed its second amended complaint. The second amended complaint contained the allegations of the original complaint, alleging that the plaintiff's milk complied with the requirements of the present Madison Ordinance, except that it was not pasteurized within five miles of Madison; that it would be useless for the plaintiff to make application under the new Ordinance because the defendants took the position that they were not obligated to inspect the plaintiff's plant and issue it a license because its pasteurization plant was not located within the five-mile zone; that the plaintiff's milk and milk products were wholesome and Grade A, as provided in the United States Model Milk Ordinance promulgated by the United States Public Health Service; that it was inspected

regularly by the inspectors of the Chicago Board of Health; that it fully complied with the Chicago Milk Ordinance; that the Chicago Ordinance was equivalent to that of the Madison Milk Ordinance; that although the plaintiff made application on March 8th, 1948, the defendants have made no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pursuant to the provisions of the City Ordinance of the City of Chicago, which is equivalent to the Madison Ordinance; that the defendants have taken no steps whatever to satisfy themselves as to the purity, quality and sanitation of the plaintiff's milk, and does not propose to do so, and claim that they have the right to refuse to do so, and thus bar the plaintiff from selling milk in the City of Madison, Wisconsin, solely because the plaintiff's milk is not pasteurized within the five-mile zone; and that the provision of the City Ordinance prohibiting the sale of all milk not pasteurized within the five-mile zone was in violation of Sec. 8, Article I of the Constitution of the United States, commonly called the Interstate Commerce Clause, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprived the plaintiff of its property without due process of law; deprived it of the equal protection of the law; and deprived it of its right to contract without due process of law; and prayed that this section of the Madison Milk Ordinance be declared null and void, and unconstitutional.

The second count of the plaintiff's complaint adopted principally the allegations of the first count; alleged that the defendants' original answer set forth as an excuse for denying the plaintiff's right to sell pasteurized Grade A

milk and milk products in the City of Madison the fact that the farms from which the plaintiff obtained its milk were located in Northern Illinois and Southern Wisconsin more than twenty-five miles from the City of Madison, Wisconsin, alleged that Sec. 7.11 of the Madison Ordinance provided that the Health Department of the City of Madison was not obligated to inspect farms and to issue permits to farms located more than twenty-five miles from the central portion of Madison, Wisconsin; alleged that the plaintiff obtained its milk from approximately 900 farms located in Northern Illinois and Southern Wisconsin at distances between forty and one hundred twenty-five miles from Madison, Wisconsin; that the plaintiff did not own any of those farms; that the defendants took the position that they had a discretion as to inspection of farms located more than twenty-five miles from the City of Madison, and claimed the right to bar the sale of plaintiff's milk because of that fact; and that the said section of the City Ordinance unlawfully restricts, limits and prohibits the plaintiff from selling its milk and milk products in the City of Madison, Wisconsin; that said section of the City Ordinance is unconstitutional, being a violation of the Fourteenth Amendment to the United States Constitution, in that it deprives the plaintiff of its right to contract, its rights to property, and denies this plaintiff the equal protection of the law; and denies to the plaintiff the right to transact a lawful business, and violates the Interstate Commerce Clause of the United States Constitution. The second count further alleged on information and belief that the City Health Department would refuse to inspect any of the farms from which the plaintiff obtained its milk, even though the owners of said farms made application to the Health Department, and that there existed a controversy between the plaintiff and the defendants as to the validity of Sec. 7.11

of the Madison Milk Ordinance, and that it was necessary for the rights of the plaintiff to be declared under Sec. 269.56 of the Wisconsin Statutes; the plaintiff prayed for a declaratory judgment declaring that section unconstitutional, and for a declaration that the defendants have not the right to restrict, prohibit or prevent the plaintiff from selling its milk or milk products in the City of Madison, Wisconsin, by virtue of Sec. 7.11 of said Ordinance.

The defendants answered the second amended complaint, and in answer to the first count, alleged that Sec. 7.21, being the five-mile limitation, was constitutional and a necessary health measure; that the City of Madison was located in Dane County, Wisconsin, which is the greatest milk producing area in the United States, and that there was ample milk supplies for the City of Madison within the limits prescribed by the Ordinance.

The defendants answered the second count and alleged:

> "The defendants admit that they take the position that the Madison Health Department has a discretion as to the inspection of farms located more than 25 miles from Madison and the issuance of permits to such farms and that it has the right to deny the issuance of permits to such farms and to deny plaintiff the right to sell its milk products made from milk produced on such farms, in the City of Madison and also for other reasons. The defendants deny that the said Ordinance or any part of it is in violation of the Constitution of the United States or any amendment thereto or of any provision of the Constitution of the State of Wisconsin."
>
> "Defendants deny that any action in refusing permits to such farms or to inspect such farms would be arbitrary, discriminatory or unreasonable * * *."
>
> "Defendants allege that in view of the great supply of milk available within a radius of 25 miles from the Capitol Square of the City of Madison, the provision

of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers.

"So long as the five mile pasteurization limit contained in Section 7.21 of the present Madison Ordinances remains in effect, these defendants deny that there is any controversy between the parties as to the validity of the provisions of Section 7.11 of the Ordinances complained of by plaintiff in its second cause of action because at no time has the plaintiff given any indication that it proposes to pasteurize its milk within the said five mile limit or at any other place in the State of Wisconsin; hence so long as the provisions of Section 7.21 of the Madison Ordinance are in effect there is no necessity for the rights of the plaintiff to be declared under Section 7.11 of the Madison Ordinances."

Trial was before the Court without a jury. Appellant's testimony shows that Dean's pasteurization plants were located at Chemung and Huntley, Illinois, which are located respectively sixty-five and eighty-five miles from Madison, Wisconsin (R. 84); that milk from the Dean pasteurization plants is sold in the City of Chicago, Illinois, surrounding municipalities of Chicago, Illinois, and cities of Northern Illinois and Southern Wisconsin, including eighteen cities and villages of Dane County, Wisconsin. (R. 312, 103). These cities require inspection of the farms where the milk is produced, of the pasteurization plants and of the facilities of transportation. The City of Chicago, Illinois, operates under a Milk Ordinance which is equivalent to the United States Model Milk Ordinance formulated by the Public Health Service of the United States, and the Chicago Milk Shed has a rating of better than 90%. (R.

313, 195-196, 198-199). The United States Model Milk Ordinance was formulated by the Public Health Service of the United States, and is recommended to the cities throughout the United States for adoption. Over two thousand cities have adopted it, and Sec. 11 of the Model Milk Ordinance provides for reciprocal inspection between the various milk sheds; that is, milk produced beyond the limits of routine inspection of the receiving city may be received from a milk shed which has been awarded by the State Control Agency a rating of 90% or more on the basis of the United States Public Health Service rating method. (R. 62-64). The revised Milk Ordinance recommended by the United States Public Health Service in Sec. 11 makes the same provision. (R. 64). The Chicago Milk Shed, where the Dean Milk is produced and pasteurized, has a rating of better than 90% for both the farms and pasteurization plants. (R. 195, 198).

Appellant's witnesses H. J. Burger, Milk Sanitarian for Janesville, Wisconsin, Dr. Fred B. Welch, Health Officer for Janesville, Wisconsin, James H. Davis and Dr. W. C. Corbett, all experts in the field of milk production, pasteurization and distribution, all testified that both the five-mile and the twenty-five mile limitations were not health measures, and were not necessary to insure a city of supply of pure, wholesome, fresh milk.

Dr. C. K. Kincaid, the chief health officer of Madison, Wisconsin, and one of the appellees, testified that in his judgment the reciprocal provision provided for in Sec. 11 of the United States Model Milk Ordinance would adequately safeguard the purity and sanitation of the milk to the consumers in Madison. (R. 62-67).

Clarence Luchterhand, milk sanitarian for the Wisconsin State Board of Health, and a witness for the appellees,

testified that the State Board of Health recommended the United States Model Milk Ordinance to the cities of Wisconsin, and that a municipality in receiving milk from distant points may safely rely upon a rating of 90% or more made by the United States Public Health Service; that the Wisconsin State Board of Health had received rating from the Chicago Milk Shed, and it showed for raw milk sold to plants, 91.05%; pasteurization plants, 93.42%, and an average of 92.34% and that those ratings were satisfactory. (R. 150-151).

The regulations provided by the United States Model Milk Ordinance in regard to sanitation, quality and wholesomeness of milk are as stringent as the recommendations of the present Madison Milk Ordinance. In addition, the Dean Milk Company has inspectors of its own that make periodical inspection of the farms where the milk is produced, of the pasteurization plant, and the facilities of transportation. (R. 81-84, 97-102).

The Circuit Court of Dane County found that the five-mile limitation was constitutional, and a reasonable health regulation, that the five-mile limitation did not violate the Interstate Commerce Clause of the Fourteenth Amendment to the Constitution of the United States. The trial court based its decision solely upon the decision of the Supreme Court of Wisconsin in the case of *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. (2d), 733.

As to the twenty-five mile limitation, the trial court held:

> "Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing

inside the five-mile limit, if Madison's five-mile pasteurization ordinance is valid—and we hereby hold it to be valid." (R. 18).

The Circuit Court of Dane County further held that it was not necessary for the court to pass upon the twenty-five mile limitation, because the Dean Milk Company was not a farmer, owned no farms, and the farmers from whom it purchased its milk were not parties to this action. (R. 17).

On appeal the Supreme Court of the State of Wisconsin on June 30th, 1950, entered judgment affirming the decision of the lower court, Justice Hughes dissenting.

II. State Statute, the Validity of Which Is Involved

There was drawn in question in this case the validity, under Section 8 of Article I and the Fourteenth Amendment of the Constitution of the United States of the respective sections of the Madison Milk Ordinance, to-wit:

Section 7.11 of the Madison Milk Ordinance:

"It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."

"Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."

"On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion

of the City of Madison, otherwise known as the Capitol Square. * * *"

Section 7.21:—

"It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

The City Ordinance is a statute within the meaning of the Judicial Code for the purpose of appeal to this Court. *John P. King Mfg. Co.* v. *City Council of Augusta,* et al. (277 U. S. 100), 48 S. Ct. 489, 72 L. Ed. 801.

III. Dates of Judgment and Appeal

The final judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Dane County, Wisconsin, holding Sec. 7.21 of the Madison City Ordinance valid, and that Sec. 7.11 presented only a moot question so long as 7.21 was a valid enactment, was entered on June 30th, 1950. *Dean Milk Company, a corporation,* v. *City of Madison, Wisconsin, a municipal corporation,* et al. —— Wis. —, 43 N.W. 2nd 480. (June 30, 1950.)

Petition for appeal to this Court was presented to the Hon. Timothy Brown, Acting Chief Justice of the Supreme Court of Wisconsin, on July 25th, 1950, and was by him allowed the same day.

V. Manner in Which Federal Question Was Raised

The Federal questions in this case were raised at the outset and urged throughout all the proceedings in the

state courts. The action was started by a summons and complaint in the Circuit Court for Dane County, Wisconsin, for a declaratory judgment to have these respective sections of the Madison Milk Ordinance declared in violation of Sec. 8 of Article I and the Fourteenth Amendment to the Constitution of the United States. The second amended complaint alleged, among other things, that the City of Madison denied the appellant the right to sell Grade A pasteurized milk and milk products within the City of Madison on the ground that appellant's pasteurization plant was not located within five miles from the Capitol Square of the City of Madison, Wisconsin, and in the second count alleged that the City of Madison denied the appellant the right to sell Grade A pasteurized milk and milk products in the City of Madison because the farms from which it obtained its milk were located more than twenty-five miles from the Capitol Square of Madison, Wisconsin, and that the action of the city in refusing to grant the appellant a license was arbitrary and unreasonable; that the above quoted provisions of the City Ordinance were unconstitutional, deprived the appellant of his property and right of contract, without due process of law, denied the appellant the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and constituted an illegal interference with Interstate Commerce. (R. 19-33).

The trial court states in its opinion:

> "Plaintiff seeks a declaratory judgment as to the constitutionality of the Madison Milk Ordinances, which provide:
>
> "(1) No milk shall be sold as pasteurized milk in the City of Madison unless it has been pasteurized and bottled within a radius of five miles from the Capitol Square."

"(2) The Health Department shall not be 'obligated' to inspect and issue permits to farms located more than twenty-five miles from the Capitol Square, as to raw milk to be delivered to pasteurization plants for sale in Madison."

"The Madison Ordinance, as adopted August 27th, 1949, contains the five mile and twenty-five mile provisions in sections 7.21 and 7.11, respectively, as follows:— * * *"

"This Court's duty is to decide upon constitutionality * * *."

"The constitutional question still is: Can Madison or Chicago or Hollywood or Schenectady provide that milk sold in its city must have been pasteurized within five miles of the center of the city and that farms more than twenty-five miles from the city need not be inspected (in effect, may not be eligible for a 'permit' to sell raw milk to pasteurization plants serving the city)?" * * *

"Is Madison's five mile pasteurization ordinance constitutional? It is." * * *

"Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five mile limit, if Madison's five mile pasteurization ordinance is valid—and we hereby hold it to be valid." (R. 1-2, 5, 6, 18).

The opinion of the Supreme Court of Wisconsin appended to this statement shows that Federal questions were presented to, considered and decided by it:

"This is an action by Dean Milk Company, an Illinois corporation, against the City of Madison, Dr. C. K. Kincaid, its Health Commissioner, Leonard Howell, its City Manager, and its Common Council,

for a declaratory judgment as to the constitutionality of two sections of the Milk Ordinance of the said city providing substantially as follows:

"(1) No milk shall be sold as pasteurized milk in the City of Madison unless it has been pasteurized and bottled within a radius of five miles from the Capitol Square.

"(2) The Health Department shall not be 'obligated' to inspect and issue permits to farms supplying raw milk for sale in said City if said farms are located beyond twenty-five miles from the Capitol Square." (R. 311).

"The plaintiff contends that its inspection, with that of the Chicago Board of Health, and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison Milk Ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution. The courts of some states have so held. This court has held otherwise in *Dyer v. City Council of Beloit*, 250 Wis. 613, 27 N.W. (2d.) 733, in which it held valid an ordinance of the city of Beloit which contained the following provision:

"'No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the city of Beloit.'" (R. 314).

V. Question Involved Is Substantial

In the case of *Dyer* v. *Common Council of the City of Beloit, et al.*, 250 Wis. 613, 27 N.W. (2d), 733, the Supreme

Court of Wisconsin held constitutional a provision of the Beloit Milk Ordinance which provided:—

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the city of Beloit."

That was the first time in the judicial history of this country that a state or Federal court of last resort had declared that a municipality might arbitrarily restrict and limit the production and sale of any wholesome food to such surrounding territory as the municipality deemed capable of producing and processing the necessary amount to supply its population.

The doctrine of that case was stated in the following portions of the opinion:—

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian v. Sippy*, 54 Cal. App. (2d) 214, 128, Pac. (2d) 884, where the court said *that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt.*"
>
> "* * * Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. *The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served.* A reasonable exercise of

police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

"This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers * * *."

The *Dean* v. *City of Beloit* case was appealed to this court, and this court noted probable jurisdiction. *Lawrence Dyer* v. *City Council of the City of Beloit, et al.*, 68 S. Ct. page 87 (October 13th, 1947). Before the case was heard, however, the City of Beloit confessed error, amended its Ordinance and gave Dyer a milk license, and moved to have the case dismissed as being moot. This motion was opposed by Dyer on the ground that it would leave standing the decision of the Supreme Court of the State of Wisconsin, and that under that decision the City of Beloit was left free to re-enact the Ordinance in question.

This Court in *Dyer* v. *City Council of the City of Beloit, et al.*, (February 2nd, 1948), 333 U. S. 825, 68 S. Ct. 450, made the following order:

"On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate. Costs in this court may be taxed against the appellees."

When the case returned to the Supreme Court of Wisconsin, that Court on March 29th, 1948, proceeded to reverse the Circuit Court for Rock County, which originally it had affirmed in holding the Ordinance valid. We quote in its entirety the text of the Wisconsin Supreme Court in *Dyer* v. *City Council of Beloit*, 252 Wis. 249:

> "In this case, the court on June 10, 1947, affirmed a judgment of the circuit court dismissing the appellant's petition for a writ of mandamus to compel the city of Beloit to issue to the appellant a license as a milk distributor, and held a certain milk ordinance of the city constitutional. The case is originally reported in 250 Wis. 613, 27 N.W. (2d) 733. In proceedings on appeal to the United States supreme court, the respondents moved to dismiss the appeal on the ground that the case was moot, the respondents confessing error and setting forth that the city had amended the ordinance and issued a milk license to the appellant pursuant to the amended ordinance. The appellant opposed a dismissal of the appeal on the ground, among others, that a dismissal would result in permitting the judgment and decision of this court to stand as a valid judgment and decision holding the original ordinance constitutional and giving the city the right to reenact the original ordinance. The United States supreme court on February 2, 1948, entered a mandate providing in part: 'On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate.' 333 U. S. 825, 68 Sup. Ct. 450, 92 L. Ed. 0000 (Reporter.)
>
> "After the filing of the mandate of the United States supreme court in this court, the appellant on March 29, 1948, moved that the judgment of the circuit court be reversed and for other relief. After hearing counsel for the respondents as well as for the appellant, this

court on March 29, 1948, entered the following mandate:

> "By the Court:—'Judgment appealed from is reversed and cause remanded with direction to dismiss the complaint.'"

In the case at bar, the trial court holds the five-mile limitation valid on the ground that the original decision by the Supreme Court of Wisconsin in *Dyer* v. *City Council of the City of Beloit*, 250 Wis. 613, 27 N.W. (2d) 733, is still the law, (the opinion of the trial court being attached hereto and marked App. A.). This is affirmed by the supreme court of the State of Wisconsin in its opinion, which is attached hereto and marked App. B.

Both the trial court and the Supreme Court of Wisconsin took the position that the facts that the appellant's milk was adequately inspected by the municipalities where it was produced, and pasteurized, and that such inspection was evaluated and checked by the United States Public Health Service, were immaterial.

The supreme court of Wisconsin stated:

> "Plaintiff contends that it would be unnecessary to hire additional inspectors, and that Dr. Kincaid as health commissioner could satisfy himself as to the quality of plaintiff's product by relying upon the inspections already made of the farms and plants in Illinois. The trial court made this answer to that contention:
>
> > 'A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The city is not forced to rely upon inspection by some other governmental unit nor to submit to "reciprocal inspection" unless some higher authority properly decrees it.'

'One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's guages of inspection purport to be equal or slightly higher.'

'The city of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet.'

"We agree with the trial court. * * *"' (R. 317).

This decision is made in the face of the testimony of Dr. C. K. Kincaid, the chief health officer of the city of Madison, who testified that reciprocal inspection method which the court condemns, provides an adequate and reasonable method to safeguard the milk of the receiving city. (R. 63-67).

General Order 125 of the Wisconsin State Department of Agriculture, effective November 15th, 1949, is entitled *"Standards and Regulations for the Production and Processing of Milk and Milk for Interstate Shipment."*

We set forth the provisions of this General Order as App. C, (the courts, including the Supreme Court of Wisconsin, are required to take judicial notice, Sec. 328.021 of the Wis. Stats.), and the preface sets forth that General Order 125 was prepared jointly by the State Department of Agriculture and the State Board of Health, and that it had been approved by the State Board of Health; that the regulations were equivalent to the Model Milk Ordinance promulgated by the United States Public Health Service, and that there would be continuous state inspec-

tion service by the Wisconsin State Department of Agriculture, and:

> "This inspection will be supplemented by the United States Public Health Service inspection to insure communities throughout the United States that when they buy Wisconsin Grade A milk, they are getting milk which meets every human health and sanitation requirement."

The emphasis of both the trial court and the Supreme Court of the fact that Dane County is a large milk producing county, and that it produces more than ten times the milk used in the city of Madison gives the key to the decision and the purpose of the Ordinance. The purpose of the Ordinance is economic protection, and these regulations are not health measures.

This Court stated in *H. B. Hood & Sons* v. *DuMond*, 336 U. S. 525, 531, 69 S. Ct. 657, at page 531-532:

> "Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 L.R.A. 55. In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to exclude it, while here its order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The State agreed then, as now, that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State. But in the earlier case, it contended that the same result could be accomplished by controlling delivery, bottling and sale after arrival, while here it says it can do so by curtailing facilities for its purchase and receipt before it is shipped out. In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competi-

tion. This Court unanimously rejected the State's contention in the Seelig case and held that the Commerce Clause, even in the absence of congressional action, prohibits such regulations for such ends."

In the case at bar the City of Madison drew two circles around itself, and absolutely prohibited all commerce originating beyond the limits of the circles. The first circle has a radius of five miles from the center of the city, and declares that all milk not pasteurized within that radius is prohibited from being sold within the City of Madison. The second circle has a radius of twenty-five miles, and prohibits the sale of any milk in the City of Madison that is not produced on farms within that zone. It is true that as to the second circle, the City Ordinance purports to place a discretion in the Health Department by stating that the Health Department will not be obligated to inspect farms beyond the twenty-five mile limit, but the fact is that the Health Department will not inspect farms beyond the twenty-five mile limit, and milk which is obtained beyond that limitation cannot be sold in the City of Madison. The defendants state in their answer as follows:—

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, * * *." (R. 40-41).
>
> "Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the several hundred farms which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by

> the ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison." (R. 42.)

The trial court made no finding that continual inspection by the City of Madison was necessary to insure the purity and sanitation of milk to be sold in Madison. The fact that Congress has not passed regulatory legislation does not save these restrictive provisions of the Madison Ordinance from the Commerce Clause. *Freeman* v. *Hewitt*, 329 U. S. 249, 67 S. Ct. 274. *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455. *Bremmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862. In the latter case, a statute prescribing a one hundred mile radius within which animals should be inspected before slaughter was held invalid.

The Madison Ordinance is in violation of the due process clause of the Fourteenth Amendment. The philosophy of the opinion of both the trial and Supreme Court of Wisconsin was that the City of Madison could make arrangements to inspect enough of the surrounding territory to supply it with milk, and prohibit entry of milk originating beyond the artificial lines prescribed by the Ordinance.

The philosophy, in substance, of both the trial and the Supreme Court of Wisconsin is that the city under the due process clause may deal with as many milk dealers as the city deems necessary to supply the local population by enlarging or constricting the circle to whatever size it deems necessary, and refusing a license to all others. Assuming that such an Ordinance is made in good faith, that will not save it from the due process clause.

In *State of Minn.* v. *Barber*, 136 U. S. 313, 34 L.E. 455, the Court stated:—

> "The presumption that this Statute was enacted in good faith for the purpose expressed in the title,

> namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the constitution of the United States. There may be no purpose upon the part of the Legislature to violate the provisions of that instrument, and yet a statute enacted by it under the forms of law be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void."

The *Supreme Court of New Jersey in Sheffield Farms Co. Inc.*, v. *Seaman*, 114 N.J.L. 455, 177A, 372, held such an ordinance to be unconstitutional, stating:—

> "The city just took the position that it had enough milk dealers, and that it had the situation well in hand. Such a position is unreasonable, it is arbitrary, capricious and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

The following cases have held that an Ordinance requiring the pasteurization plant to be located within the city limits is unconstitutional: *State ex rel Larson* v. *City of Minneapolis*, 190 Minn. 138, 251 N.W. 121; *La Franchi* v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 301.

The following cases held city Ordinances which prescribed that the pasteurization plant should be located within the boundaries of the county in which the city was located, invalid, as a violation of due process: *Meridian* v. *Sippy*, 54 Cal. App. (2d) 214, 128 P. (2d) 884. At page 888 the Court stated:—

> "Any Ordinance or Statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes

it reasonably necessary. Such is not the case here. The contention of respondent, if approved, might result in the erection of trade barriers that would affect the economic prosperity of the whole state."

Grant v. *Leavell*, 259 Ky. 267, 82 S.W. (2d) 283; *Prescott* v. *City of Borger* (Tex. App.) 158 S.W. (2d) 578.

Dean Milk Company v. *City of Waukegan* (1949, Ill.) 87 N.E. (2d) 751, held unconstitutional an Ordinance which barred the sale of milk in Waukegan which was not pasteurized and produced in Lake County, Illinois.

Higgins v. *City of Galesburg (Ill.)*, 81 N.E. (2d) 520, held unconstitutional a City Ordinance which barred the sale of milk not pasteurized within ten miles of the City of Galesburg.

Miller v. *Williams*, 12 Fed. Supp. 236, held unconstitutional a regulation of the Health Commissioner of the City of Baltimore which prohibited the use or sale of cream for the manufacture of ice cream by dairies situated more than fifty miles from the city limits.

The case of *Urban* v. *Taylor*, (N.J.) 188 Atl. 232, held that the excuse that there was sufficient milk within the neighborhood, and that it was too expensive and inconvenient to inspect farms further away, would not stand the test of due process.

Opinions of the Attorney General of Michigan, Biennial Report of the Attorney General, 47-48, No. 0-5105, Nov. 6, 1946, holds that a City Ordinance providing that no license shall be granted to a milk producer whose dairy farm is more than thirty miles from the city of Midland, and whose plant is located outside of the city, is violative of the constitutional rights of property and contract of a dealer whose plant is located outside of the city. It is further discriminatory and invalid.

In the case of *City of Wewoka* v. *Rose Lawn Dairy* (Okla.),

212 P. (2d) 1056, the Court held that when the applicant's milk comes from a milk shed with a United States Public Health Service rating of 90 percent or more, that it is arbitrary for the health officer to bar the milk upon the excuse that he hasn't the funds or the time to inspect the milk at its sources.

Moultrie Milk Shed Inc. v. *Cairo*, (Ga. 1950) 57 S.E. (2d) 199, holds unconstitutional and unreasonable a City Ordinance which prohibited the sale of milk which is not pasteurized in the county.

There are no decisions of any court of last resort in this country outside of the above decision of the Supreme Court of Wisconsin that sustain the validity of similar Ordinances.

The position of the trial court and of the Supreme Court that the appellant cannot have his rights adjudicated as to the twenty-five mile limitation because of the facts (1) that the question is moot so long as the five-mile limitation is valid, and (2) that the 950 various farmers which the appellant purchases its milk from in Northern Illinois and Southern Wisconsin are not party plaintiffs, violates the due process clause of the Fourteenth Amendment and denies to the appellant the equal protection of the law, because it virtually and in fact denies the appellant access to the courts of Wisconsin to have its rights adjudicated therein. The appellant purchases milk from approximately 950 farms. This milk is delivered to the appellant's pasteurization plants, is paid for and becomes the property of the appellant. None of these 950 farmers are selling milk or proposing to sell milk in the City of Madison. They sell their milk to the Dean Milk Company, and they have no further voice in the matter as to what becomes of the milk after that.

Sec. 7.11 of the Madison Milk Ordinance prohibits the

Dean Milk Company from selling milk in the City of Madison. It provides that:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin * * * "for sale or to sell or offer for sale therein or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this Ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."

This section further provides that:

> "The Health Department shall not be obligated to inspect the farms and issue a permit to farms located more than twenty-five miles away."

This paragraph certainly means what it says, that the Dean Milk Company is prohibited from selling milk in the City of Madison, because the source of its milk is produced on farms that do not have permits. The section further provides that the Health Department will not be obligated to inspect and issue permits to farms more than twenty-five miles away. All of the farms from which the Dean Milk Company obtains its milk are more than twenty-five miles away, and as above quoted from the appellees' answer, the appellees will not inspect farms located more than twenty-five miles away, and in fact refuses to even furnish the plaintiff with the applications provided for in this section of the Ordinance. (R. 312-313.)

Sec. 269.56 of the Wisconsin Statutes is the Uniform Declaratory Judgment Act, and provides as follows:—

> (1) "Courts of record * * * shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. * * * and such declaration shall have the force and effect of a final judgment or decree.

(2) "Any person * * * whose rights, status or other legal relations are affected by a * * * municipal ordinance * * * may have determined any question of * * * validity arising under the * * * ordinance * * * and obtain a declaration of rights, status or other legal relations thereunder.

(11) "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

The appellant having applied for a license to sell its milk in the City of Madison, and having been denied the right on the excuse that its milk was not pasteurized within five miles of the City of Madison, and that its milk came from sources more than twenty-five miles away from the City of Madison, was entitled under this statute to have an adjudication of its rights, and a denial thereof is a denial of due process, and of the equal protection of the law, because it in fact denies the appellant access to the courts of Wisconsin.

Assuming that the appellant did persuade 950 farms in Northern Illinois and Southern Wisconsin to start law suits in the City of Madison attacking the validity of the twenty-five mile limitation, the Wisconsin courts would refuse to pass upon the validity of the twenty-five mile limitation because the trial court plainly stated in his opinion, which is approved by the Supreme Court, that so long as the Dean Milk Company was not going to

pasteurize within the five-mile zone, then the twenty-five mile question was moot.

How would the 950 farmers have any standing in the Wisconsin courts anyway, because they do not propose to sell milk in Madison? They sell their milk to the Dean Milk Company and lose all title to the milk after it is sold to the Dean Milk Company. It is the Dean Milk Company that proposes to sell milk in the City of Madison.

The decision compelling the appellant to submit to this section of the Ordinance, by refusing it a remedy, necessarily affirms the validity of this section as to appellant. *Fiske* v. *State of Kansas*, 274 U. S. 380, 47 S. Ct. 655.

This Court said in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451 at page 453:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because assuming power and merit, the plaintiff did not first seek an administrative remedy which in fact was not available *and which is not now open to it*. Thus by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

Applying this reasoning to the case at bar, the State of Wisconsin declines to declare the twenty-five mile limitation unconstitutional, not because of any demerit in the plaintiff's complaint, but because it says that the remedy is not available to the appellant, and that no remedy is now open to the appellant. If the appellant persuaded the 950 farmers to start their litigation, they would be turned out of court on the excuse that the five-mile limitation made the question moot anyway.

The Wisconsin courts have ample power under the declaratory judgment statute to give the appellant the relief that it is entitled to under the Constitution of the United States.

The *Brinkerhoff-Faris Trust & Savings Company* v. *Hill* opinion continues at page 454 as follows:

> "The Federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. * * *
>
> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. * * * whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy unless there is, or was, afforded to him some real opportunity to protect it."

Under the decision of the trial court, which is approved by the Supreme Court of Wisconsin, the appellant is denied all opportunity to have the twenty-five mile limitation declared unconstitutional and no opportunity is given to the appellant to protect its right in this matter.

In *Home Ins. Co. of N. Y.* v. *Morse*, 22 Wallace 445, 22 S. Ct. 365, at page 368:—

> "Every citizen is entitled to resort to all of the courts of the country, and to invoke the protection which all laws of all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

VI. It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under the Act of June 25th, 1948 (c) 646, 62 Stats. 929, 28 U. S. C. A. Sec. 1257.

The opinion of the trial court is attached hereto and marked Appendix A. The opinion of the Supreme Court of Wisconsin is attached and marked Appendix B, and preface of the General Order 125 of the Wisconsin State Department of Agriculture is attached hereto and marked Appendix C.

J. Arthur Moran,
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Delavan, Wis.

George S. Geffs, Jacob Geffs & Eli Block,
Janesville, Wis.,
Of Counsel.

APPENDIX "A"

IN CIRCUIT COURT OF THE STATE OF WISCONSIN FOR DANE COUNTY

DEAN MILK COMPANY, a Corporation, Plaintiff,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation; DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin; LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN, Defendants.

Before Hon. Alvin C. Reis, Judge.

DECISION

Plaintiff seeks a declaratory judgment as to the constitutionality of Madison's milk ordinances which provide: (1) No milk shall be sold as pasteurized milk in the city of Madison unless it has been pasteurized and bottled within a radius of five miles from the Capitol Square. (2) The Health Department shall not be "obligated" to inspect and issue permits to farms located more than twenty-five miles from the Capitol Square, as to raw milk to be delivered to pasteurization plants for sale in Madison.

The Madison ordinance, as adopted August 27, 1949, contains the five-mile and twenty-five mile provisions in sections 7.21 and 7.11, respectively, as follows:

> "7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facili-

ties, all of which shall have been approved by the Department of Public Health".

"7.11. Permits. . . . On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square."

The Madison milk situation is summarized in the City's brief (p. 3) as follows:

"Madison is in the center of Dane County which produced in 1948 over 600,000,000 pounds of milk. This is more than ten times the milk used in the City. Large quantities of milk are shipped to the Chicago market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the Capital Square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished entirely from farms located within about 18 miles of the Capital Square.

"There are several distributors of milk in Madison, all of whose plants are located within 5 miles of the Capital Square: (1) The University of Wisconsin has its own plants for pasteurizing and supplying milk to University Halls and commons; (2) Rennebohm Farm supplies only the various Rennebohm Drug Stores and does not supply all of the stores' needs. There are three retail and wholesale dealers, the Borden Company, Bancroft Dairy and Bowman Farm Dairy supplying the city.

"Many of the producers are represented by a cooperative association which bargains for the producer with the dealers on the price of milk, checks weights and tests, inspects milk and assists in milk quality control.

The cooperative also owns and operates a surplus plant through which it markets milk of Madison licensed producers which may from time to time be in excess of the milk required for consumption in Madison.

"All producers delivering on the Madison market are licensed by the City Health Department and are inspected by representatives of the Health Department as well as by representatives of the dealers and of the Cooperative Association."

Plaintiff is an Illinois corporation, with its principal place of business in Chicago. It has pasteurization plants at Chemung and Huntley, Illinois. Its milk is supplied by about 950 farms located chiefly in Illinois. These farms are licensed by the Chicago Board of Health and are inspected by that department. The plaintiff company also inspects the producers' farms and makes tests of milk purchased.

Plaintiff applied to the Madison Board of Health in March, 1948, for a license to sell milk in Madison. This was refused. On October 1, 1949, plaintiff applied to the Madison Board of Health for 950 farm permit application blanks. These were not furnished. Dr. Kincaid—the City Health Commissioner—explained that there was no point in having Dean's Illinois producers apply for permits until it was determined whether the five-mile limit on pasteurization plants was legal—since admittedly Dean has no intention of pasteurizing within five miles of Madison but desires to sell milk in Madison which has been pasteurized in Illinois plants.

The above reflects with reasonable adequateness the background of the instant case.

We are constrained to remark that a record has been built up in the present law suit upon miscellaneous matters not decisive of the case, in our judgment, such as the relative merits of the United States Public Health Service "model" milk ordinance and the Chicago milk ordinance as compared with the Madison general milk requirements' ordinance; also the relative goodness and purity of plain-

tiff Dean's milk compared with Bowman's, Borden's and Bancroft's, *et al.*, now consumed in Madison; further, the relative efficiency of inspection as between the Chicago Health Department and the Madison Health Department. Counsel even argue the issue whether the "methylene blue" or the "plate count" is the preferable test to determine if the number of bacteria in milk exceeds 200,000 per cubic centimeter!

We shall not exhaust brain tissue on such wanderings.

This Court's duty is to decide upon constitutionality, which decision, if it is good law, is good under the Federal Constitution anywhere in the United States and that decision cannot be swayed by a consideration of whether Madison's general milk requirements' ordinance is better or worse than some other ordinance in its provisions that water must be from state well-code wells, and milk must be cooled to 50°, while Chicago says 60°; and manure shall be pitched fifty feet from the barn door, whereas Chicago permits the pitch to be but thirty; the Madison ordinance requiring plant inspection every thirty days but Chicago, six months; and the provision as "the trap in the drain from the milk house", the "breezeway between the milk-house and the barn"; etc., etc.

How would the constitutional question in California be changed, even if Hollywood had a better or worse trap in the drain or breeze-way provision than Madison or Chicago? How would it be changed in New York if Schenectady called for 48° cooling or issues a mandate to scurry out the manure at least 70 feet?

The constitutional question still is: Can Madison or Chicago or Hollywood or Schenectady provide that milk sold in its city must have been pasteurized within five miles of the center of the city and that farms more than twenty-five miles from the city need not be inspected (in effect, may not be eligible for a "permit" to sell raw milk to pasteurization plants serving the city)?

True it may be, as counsel for the City points out (brief, p. 17), that the *basic* local situation as to whether a city has ten times as much milk produced in its immediate environs as it needs—which is Madison's situation—or whether it is

compelled to "range far afield" for milk (*Ibid*)—which may be the fact in large metropolitan areas—this or some similar underlying and fundamental economic condition may affect the reasonableness, and hence the validity, of an ordinance:

But blue test or plate count—a pitch of fifty or thirty feet from the barn—50° or 60° cooling—and such minutiae *ad infinitum*—go only to the question of whether Madison or Chicago has the better kind of milk regulations as to health and sanitary requirements. These details as to how to produce and care for milk do not hit the constitutional issue of the five-mile limit at all, as we view it.

Is Madison's five-mile pasteurization ordinance constitutional?. It is.

Madison's five-mile pasteurization ordinance is a valid regulation under the "police power" to protect the public health and welfare. It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than if such establishments were located anywhere in the United States.

A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The City is not forced to rely upon inspection by some other governmental unit nor to submit to "reciprocal inspection" unless some higher authority properly decrees it.

One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet.

Is this five mile limit valid? The all-sufficient answer is that our Supreme Court of Wisconsin has held it valid, i.e., has held that an ordinance imposing a *six* mile limit on pasteurization plants is valid; and probably no one

would seek to split the hair on principle between five and six. The six mile ordinance was the Beloit enactment —which our Supreme Court upheld against all constitutional objection.—*Dyer* v. *City Council of Beloit*, 250 Wis. 613—*The high court's decision was on June 10, 1947.*

The Supreme Court of Wisconsin as a Court must overrule its decision of two years ago or else Madison's five mile pasteurization ordinance stands.

Petitioner in the *Beloit* case was one Dyer, a distributor for the same Dean Milk Company which is plaintiff in the case at bar. The City denied him a license to sell milk in Beloit because of its ordinance which provided (as quoted in the Supreme Court opinion, p. 615):

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State street and East Grand avenue in the city of Beloit."

The Supreme Court in the *Beloit* case (p. 615) states Dyer's (Dean's) position which is exactly Dean's position today:

> "It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth amendment of the constitution of the United States, and is in conflict with the interstate-commerce clause of the United States constitution, sec. 8, art. I."

The Supreme Court so thoroughly disposed of Dyer's (Dean's) contentions—which are the same contentions of Dean today—and that Court so precisely stated the factual picture at Beloit which is quite parallel with the one at Madison—that we quote at length from the Court's 1947 opinion (pp. 616-618):

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go

beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur., Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purpose sought to be accomplished and the effect upon all who must comply with it.

"The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries, and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to near-by plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the

milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk.

"It is claimed by appellant, and admitted by the city sanitarian from a few examinations made by him, that the milk produced by the Dean Milk Company complied with the sediment tests, blue tests, other tests, and content requirements of the ordinance of the city of Beloit. This could well be true of milk purchased from a pasteurization plant a much greater distance from the city of Beloit. Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance. It is said in *State ex rel. Larson* v. *Minneapolis* (1933), 190 Minn. 138, 142, 251 N. W. 121, with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

"'It is obvious that the adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed.'

"The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident.

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian, Ltd.*, v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, where the court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, *which rule we do not adopt.*" (Our italics.)

It should be noted that the Supreme Court of Wisconsin, in the foregoing, REFUSES to adopt the rule laid down by some court or courts, namely, that if the milk is "a clean, pure and wholesome product", therefore "it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers" —which is Dean's argument in almost its exact words, *infra*.

Our Court then continued and declared the law in a nutshell (pp. 618-619):

> "Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

Thus our Supreme Court dealt with Dean's argument that due process was denied it, under the Fourteenth Amendment of the Federal Constitution.

Dean in the case now before us, as well as in the *Beloit* case, advanced also the argument that the local ordinance interfered with interstate commerce and hence impinged upon the Federal Constitution.

Dean's position on interstate commerce is set forth concisely in its reply brief (p. 6) in the present case: "The test is, is the food or milk which the plaintiff proposes to sell a pure, wholesome product? If it is, it cannot be barred from interstate commerce."

But the Supreme Court did not agree with this argument in the *Beloit* case, for with equal conciseness the Court stated (p. 619):

> "This ordinance does not violate the interstate-commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers."

To be sure, the Court indicated that milk was being furnished to Beloit from both Illinois and Wisconsin; and it concluded that interstate commerce was not impaired. That consideration in the *Madison* case would go only to the twenty-five mile limit on inspection and permits to farms—the *second* ordinance herein attacked which we will discuss, *infra*.

There certainly can be no interference with interstate commerce by an ordinance reciting that milk must be *pasteurized* within five miles of Madison. That requirement seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation.

We unquestionably could render a declaratory judgment today upholding constitutionality of the five mile pasteurization ordinance in a one sentence opinion citing *Dean* v. *Beloit* decided 1947—except for the strange aftermath to the Supreme Court's opinion in that case.

After the Court's decision in their favor, the Beloit authorities changed their mind, amended their ordinance, and granted Dyer (Dean) a license. Dyer had, in the meantime, appealed from our Supreme Court's decision to the Supreme Court of the United States and there the Beloit authorities adopted the twist of moving to dismiss Dyer's appeal upon the ground that their change of heart by granting Dyer (Dean) a license had made the case moot. Thereupon, Dean objected to dismissing the appeal for the purported reason that this would leave the Wisconsin Supreme Court's decision in effect, upholding the ordinance.

So, the Supreme Court of the United States *vacates* the Wisconsin Supreme Court's decision and remands the case to the Wisconsin high court "for such further proceedings as by that court may be deemed appropriate." Whereupon the Wisconsin Supreme Court REVERSES the Circuit Court for Rock County which originally it had affirmed in holding the ordinance valid!—*Dyer* v. *City Council of Beloit*, 252 Wis. 249 (March 29, 1948).

We quote in its entirety the text of the denominated reversal, all of which is printed in the type of a head-note (252 Wis. at 250):

> "In this case, the court on June 10, 1947, affirmed a judgment of the circuit court dismissing the appellant's petition for a writ of *mandamus* to compel the city of Beloit to issue to the appellant a license as a milk distributor, and held a certain milk ordinance of the city constitutional. The case is originally reported in 250 Wis. 613, 27 N. W. (2d) 733. In proceedings on appeal to the United States Supreme Court, the respondents moved to dismiss the appeal on the ground that the case was moot, the respondents confessing error and setting forth that the city had amended the ordinance and issued a milk license to the appellant pursuant to the amended ordinance. The appellant opposed a dismissal of the appeal on the ground, among others, that a dismissal would result in permitting the judgment and decision of this court to stand as a valid judgment and decision holding the original ordinance constitutional and giving the city

the right to re-enact the original ordinance. The United States Supreme Court on February 2, 1948, entered a mandate providing in part: 'On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further progeedings as by that court may be deemed appropriate.' 333 U. S. 825, 68 Sup. Ct. 450, 92 L. Ed. 0000. [Reporter.]

"After the filing of the mandate of the United States Supreme Court in this court, the appellant on March 29, 1948, moved that the judgment of the circuit court be reversed and for other relief. After hearing counsel for the respondents as well as for the appellant, this court on March 29, 1948, entered the following mandate:

"*By the Court.*—'Judgment appealed from is reversed and cause remanded with directions to dismiss the complaint.'"

This *pro forma* action, the Supreme Court at Washington by vacating and the Wisconsin Supreme Court by so-called reversing, under the circumstances, surely has not erased and annihilated our Supreme Court's decision in the Beloit case *on the merits*.

Said the Supreme Court of the United States in *Berry v. Davis*, 242 U. S. 468, 470; 61 L. ed. 441, 442:

> "An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. . . . Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party."

Plaintiff Dean cites us to a very late case—September 22, 1949—wherein the Supreme Court of Illinois decides in Dean's favor and holds invalid a Waukegan ordinance forbidding sale of milk in that city, unless the milk was

produced and pasteurized in Lake County (wherein Waukegan is located).—*Dean Milk Co.* v. *City of Waukegan* — Ill. —, 87 N. E. (2d) 751.

It is to be observed, of course, that the Waukegan ordinance demanded that *both* production and pasteurization of milk must be within Lake County, whereas Madison's five mile ordinance on pasteurization—in and of itself—contains no mileage limit on production. The Wisconsin Supreme Court's decision in the Beloit case and the Illinois Supreme Court's decision in the Waukegan case, therefore, may be distinguishable.

Let us suppose, however, that the decisions of the highest courts of Illinois and Wisconsin are in conflict. What of it? We have never appreciated the idea of trying to reconcile the decisions of all courts everywhere, which apparently is the strain of most attorneys' briefs and of many judicial opinions.

Why compare incomparables? Men's minds and ideals and backgrounds differ, particularly in that shadowy domain of what is in the best interest of public health and the "general welfare."

Judges are lawyers. Lawyers differ in their opinions. Judges do not cease to be lawyers simply because they don black robes. Why should they not continue to have divergent opinions?

Philosophizing aside—Illinois and Wisconsin high courts are opposed, we assume, on a certain issue of constitutional law. Shall we follow the Supreme Court of Illinois or the Supreme Court of Wisconsin? *Which do we have to follow?* Perforce it is the Wisconsin Supreme Court, even though we disagreed with it—*which we do NOT* in this case.

Accordingly, our conclusion is that the die has been cast—so far as Madison's five mile pasteurization ordinance is concerned—by the Supreme Court's sustaining of Beloit's six mile pasteurization ordinance, *supra*.

We come now to the 25 mile provision on inspection of milk farms and the consequence implicit in the ordinance, that is, that the Health Department need not inspect farms beyond 25 miles from Madison and hence these farmers—950 of them in Dean's territory in Illinois—may be in-

eligible for permits to produce milk for the Madison market.

We agree with the City Attorney (brief pp. 2, 22) that the Court need not pass upon this 25 mile ordinance provision as to farmers, in the present litigation. Dean Milk Company is not a farmer—owns no farms. The 950 farmers are not parties in this action nor is a single Illinois farmer such a party. The party plaintiff milk distributing corporation is not privileged to champion the rights of others and force an adjudication as to them.

Moreover, there is no "justiciable controversy"—to use an erudite term—between Dean and Madison as to the 25 mile limit—and justiciable controversy is of the essence in an application for a declaratory judgment.

Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five mile limit, if Madison's five mile pasteurization ordinance is valid—and we hereby hold it to be valid.

So our decision is confined to upholding the constitutionality of the five mile pasteurization ordinance and we do not penetrate the inquiry as to whether restricting milk production, in substance, to a 25 mile zone, is a violation of anyone's constitutional rights. We shall cross that bridge when we get to it in a proper case, if ever we do.

The City Attorney may prepare and submit to opposing counsel a declaratory judgment, adjudging sec. 7.21 of the city ordinance of Madison to be valid in its enactment as follows:

> "7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the

City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

Dated, December 13, 1949.

APPENDIX "B"

IN SUPREME COURT OF THE STATE OF WISCONSIN

AUGUST TERM, 1949

No. 216

DEAN MILK CO., a Corporation, Appellant,

v.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, et al., Respondents.

Appeal from a judgment of the Circuit Court for Dane County: ALVIN C. REIS, Circuit Judge. *Affirmed.*

This is an action by the Dean Milk Company, an Illinois corporation, against the city of Madison, Dr. C. K. Kincaid, its Health Commissioner, Leonard Howell, its city manager, and its common council, for a declaratory judgment as to the constitutionality of two sections of the milk ordinance of said city providing substantially as follows: (1) No milk shall be sold as pasteurized milk in the city of Madison unless it has been pasteurized and bottled within a radius of five miles from the capitol square; and (2) the Health Department shall not be obligated to inspect and issue permits to farms supplying raw milk for sale in said city if said farms are located beyond twenty-five miles from the capitol square. Judgment was entered December 30, 1949, declaring: (1) That the five-mile limitation is constitutional, and (2) that in this action no justiciable controversy existed as to the twenty-five mile limitation and plaintiff's com-

plaint was dismissed so far as it involved that question. Plaintiff appealed from the judgment.

Plaintiff is engaged in distributing Grade A pasteurized milk and other milk products in Chicago and other communities in Illinois and southern Wisconsin, including some within Dane county. It purchases and gathers milk from approximately nine hundred fifty farms located in northern Illinois and southern Wisconsin. None of these farms is within twenty-five miles of Madison. It pasteurizes and bottles the milk so gathered in plants at Chemung and Huntley, Illinois. The exact distance from these plants to Madison does not appear in the record, but they are located beyond the southern boundary of the state of Wisconsin which is approximately fifty miles from Madison.

On March 8, 1948, the plaintiff applied to the city of Madison for a license to sell its Grade A pasteurized milk and other milk products within the city. On March 12, 1948, its application for such license was denied. On November 20, 1948, plaintiff commenced this action for declaratory relief. While this suit was pending, and on August 27, 1949, the city of Madison adopted a new ordinance retaining the five-mile limitation and inserting the twenty-five mile limitation, which up to that time had not been a part of its milk ordinance. On October 1, 1949, plaintiff applied to the Madison Board of Health for nine hundred fifty farm application blanks. They were not forwarded. Plaintiff then filed an amended complaint attacking both the five-mile and twenty-five mile limitations. The defendants secured an order to show cause why all reference to the twenty-five mile limitation should not be stricken from the plaintiff's amended complaint. The trial court denied this order to show cause but ordered plaintiff to file a second amended complaint separating the two causes of action. Thereafter the plaintiff filed its second amended complaint.

The testimony of plaintiff's witnesses showed in detail the means used by the plaintiff to inspect the farms from which it purchased raw milk and the inspection and care taken in each step after the milk was gathered from the farm until bottled and delivered to dealers for sale. Plaintiff also

introduced testimony as to the inspection made by the inspectors of the Chicago Health Department and of spot checks by inspectors for the United States Public Health Service.

The defendants, by their witnesses, showed that Madison is the center of Dane county which in 1948 produced six hundred million pounds of milk, more than ten times the amount consumed in the city. They also showed in detail how the city inspected the farms producing milk for consumption within the city and the plants in which it is pasteurized and bottled. Both sides showed the tests made in their laboratories as to raw milk from the farms and also of the products after pasteurization.

BROADFOOT, J.:

The testimony introduced proves conclusively that milk is a very perishable product, and that it is subject to contamination by odors, by foreign substances, and by bacteria. In order to be sure of healthful milk of high quality it is necessary to have rigid and frequent inspection of the farms producing raw milk for human consumption. It is necessary to inspect the ventilation, lighting and cleanliness of the barns in which the cows are sheltered, the drainage and water supply, the milking equipment, the cooling and storage equipment, and the health of the cattle and of the persons taking care of the milk, as well as the pasteurization plants.

The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States constitution. The courts of some states have so held. This court has held otherwise in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27, N. W. (2d) 733, in which

it held valid an ordinance of the city of Beloit which contained the following provision:

"No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State street and East Grand avenue in the city of Beloit."

In that case the court said, p. 616:

"That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur., Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purposes sought to be accomplished and the effect upon all who must comply with it."

The present status of the decision in the *Dyer Case* is in dispute. The plaintiff in that case appealed to the United States Supreme Court and while the appeal was pending the city of Beloit amended its ordinance and granted Dyer a license. A motion was then made on behalf of the Beloit authorities to dismiss Dyer's appeal upon the ground that

the case had become moot. Plaintiff Dyer objected to dismissing the appeal but the United States Supreme Court on February 2, 1948, entered a mandate providing in part:

"On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate." 333 U. S. 825.

Thereafter this court (252 Wis. 249, 250, 32 N. W. (2d) 333) after reviewing the action of the United States Supreme Court and quoting the above portion of its mandate entered the following mandate:

"By the Court.—Judgment appealed from is reversed and cause remanded with directions to dismiss the complaint."

The plaintiff contends that this eliminated the decision in the *Dyer Case*. The trial court answered this argument as follows:

"This *pro forma* action, the Supreme Court at Washington by vacating and the Wisconsin Supreme Court by so-called reversing, under the circumstances, surely has not erased and annihilated our supreme court's decision in the *Beloit* case *on the merits*.

"Said the Supreme Court of the United States in *Berry* v. *Davis*, 242 U. S. 468, 470; 61 L. Ed. 441, 442:

"'An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. * * * Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party.'"

Whatever the effect of the mandate of this court in the *Dyer Case* after the record was remanded by the

United States Supreme Court, the reasoning and logic of that decision still stand.

In addition to what was said by this court in the *Dyer Case*, once the plaintiff has recognized the necessity of rigid standards for the production, processing and marketing of milk for human consumption and the necessity of frequent and rigid inspection to see that these standards are maintained, then it follows, as stated in the *Dyer Case* (p. 617), "Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance." Dr. Kincaid, the health commissioner of the city of Madison, testified that if plaintiff's milk was to be sold in Madison it would require the hiring of additional inspectors to inspect the farms from which the milk is gathered and the plants in which it is pasteurized and bottled. Thus convenience and efficiency would be lessened and costs would be increased. Plaintiff contends that it would be unnecessary to hire additional inspectors, and that Dr. Kincaid as health commissioner could satisfy himself as to the quality of plaintiff's product by relying upon the inspections already made of the farms and plants in Illinois. The trial court made this answer to that contention:

"A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The city is not forced to rely upon inspection by some other governmental unit nor to submit to 'reciprocal inspection' unless some higher authority properly decrees it.

"One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

"The city of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet."

We agree with the trial court. The five-mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of the ordinance was not adopted to exclude plaintiff, nor does it discriminate against it.

As to plaintiff's contention that the twenty-five mile limitation is likewise unconstitutional, we affirm the trial court in holding that there is no justiciable controversy between the parties on that question. Dean Milk Company is not a farmer and, so far as the record shows, owns no farm. No farmer producing milk is a party to this action, and plaintiff is not entitled to ask for a judgment declaring the rights of persons who are not parties to the action.

By the Court.—Judgment affirmed.

APPENDIX "C"

Wisconsin Voluntary Grade A Fluid Milk Plan Offers New Service To Out-of-State Markets

Wisconsin is the nation's Number 1 milk producing state. For many years we have produced daily about 6 quarts of milk per capita as compared with an average of about one quart per capita for the nation.

With this huge production of milk it is natural that the greater part must be marketed outside of the state—as fluid milk and cream or as manufactured dairy products. Many metropolitan markets depend upon Wisconsin as their source of fluid whole milk to meet the daily needs of their people. In 1948, as an example, we produced approximately 15,000,000,000 pounds of milk. Of this production, 2,395,000,000 pounds, or 16 per cent, was marketed outside of the state as fluid milk and cream.

Now, for the first time, Wisconsin is making available a service which will provide inspection and continuous supervision for areas producing milk for the fluid markets in other states.

The people of other states and in the cities outside of Wisconsin seek a supply of high quality fluid milk in our state. They should not be expected or required to maintain their own inspection services in Wisconsin. Such states and cities, naturally, are vitally interested in quality. They want a milk supply that is pure and wholesome and which has been produced and processed under the highest quality standards from the standpoint of human health. This is a just demand, and Wisconsin is in complete accord with such safeguards for the protection of public health.

General Order No. 125 provides the machinery which will make it possible for our dairy plants to supply the demands of these out-of-state markets and give the people of those areas the public health safeguards to which they are entitled. High sanitary standards are set up, coupled with a close, continuous state inspection service by the Wisconsin State Department of Agriculture. This inspection will be supplemented by U. S. Public Health Service inspections to insure consumers throughout the United States that when they buy Wisconsin Grade A milk they are getting milk which meets every human health and sanitation requirement.

The service provided by this order is primarily a service to milk consumers in the metropolitan centers throughout the United States. Service to Wisconsin producers and processors is secondary.

The standards promulgated in the order have been modeled after the USPHS recommended ordinance and milk code, and its provisions are substantially the equivalent of this code.

General Order 125 was prepared jointly by the Wisconsin State Department of Agriculture and the State Board of Health. The order has also been approved by the State Board of Health.

During its preparation the Department of Agriculture has enjoyed the counsel and assistance of an Advisory Committee consisting of men whose names are recognized throughout the nation as leaders in this field. Their counsel has been of great value in drafting standards which will meet the demands of fluid milk markets throughout

the nation. Members of this committee will continue to work with the Department of Agriculture in the operation of the program.

The plan calls for constant inspection and supervision of producing farms, plants, equipment and transportation facilities by competent milk sanitarians employed by the Wisconsin Department of Agriculture. The State Board of Health will serve as the survey and certification agency and all ratings will be periodically spot-checked before publication by the Region V Office of the U. S. Public Health Service. In addition, the State Board of Health will serve in an advisory capacity to the program and will share in the responsibility for training of the milk sanitarians, plant managers and fieldmen.

MILTON H. BUTTON, *Director,*
State Department of Agriculture.